IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 34

TIMES FILM CORPORATION, *Petitioner*,

v.

CITY OF CHICAGO, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF HMH PUBLISHING COMPANY, INC., PUBLISHERS OF PLAYBOY MAGAZINE, FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF

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INDEX

CITATIONS

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MOTION OF HMH PUBLISHING COMPANY, INC., PUBLISHERS OF PLAYBOY MAGAZINE, FOR LEAVE TO FILE BRIEF AMICUS CURIAE

HMH Publishing Company, Inc., publisher of Playboy Magazine, hereby moves for leave to file the attached brief *amicus curiae* in No. 34, October Term 1960, *Times Film Corporation, Petitioner* v. *City of Chicago, et al., Respondents.* Petitioner, Times Film Corporation, has consented to this motion.

HMH Publishing Company, Inc., publishes and sells throughout the United States a magazine called "Playboy." A large part of Playboy's revenue is derived

from respectable and responsible nationwide advertisers. It has over a million circulation. It has been granted second class mailing privileges by the Postmaster General.

Playboy has a direct and substantial interest in this case because the majority opinion, if permitted to stand in its present form, can and probably will be widely interpreted to permit prior restraints by police censors to the printed word as well as to films. Moreover, the implication of the opinion is that the police may employ the standard of obscenity approved in *Roth* v. *United States*, 354 U.S. 476, 486 (1957)—material which has a "substantial tendency to deprave or corrupt . . . by inciting lascivious thoughts or arousing lustful desires"—but which has been qualified by the decisions on concrete materials which followed the *Roth* case. We are convinced that such a standard, while proper for a court, cannot be applied by the police in imposing a prior restraint, without in effect destroying any magazine of the character of Playboy.

Playboy is convinced that the widely circulated majority opinion will inspire the enactment of ordinances in many cities giving the police authority to censor magazines and to exercise prior restraint. Officials of the City of Chicago have already publicly announced such intention, and the city's corporation counsel has been quoted to the effect that he is about to crack down on pornographic magazines.

Playboy cannot survive the suspension of its publication by such prior restraints during the long interval while the matter is proceeding from state courts over the United States to this Court. Entire issues of the magazine will become worthless during such suspension. In addition, Playboy will lose all its revenues

from responsible and respectable national advertisers. Such advertisers are unwilling to take space in a magazine which has been condemned as obscene by any public body.

This brief presents the reasons why a magazine of the character of Playboy will, in effect, be destroyed by police prior restraints under ordinances which inevitably will be passed following the authority of the majority opinion in this case. We have also presented the reasons why the majority opinion will be construed by widely scattered police commissioners in such a way as to produce that result. We have indicated why we believe it imperative that the majority opinion be clarified.

We do not believe that the points contained in this brief will be adequately treated by the parties in this case or by the other *amici*. Playboy alone has the information and experience to present to the Court the practical effects which the majority opinion may have on a magazine of its character and which we do not believe were intended by the majority.

For the reasons given above, it is respectfully urged that the present motion be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE FOR HMH PUBLISHING COMPANY, INC., PUBLISHERS OF PLAYBOY MAGAZINE

INTRODUCTORY STATEMENT

Playboy Magazine has over a million circulation per month. Its newsstand sales exceed the combined newsstand sales per issue of *Time, Esquire, Holiday, Newsweek, New Yorker* and *Sports Illustrated.* It is sold in all the best hotels. The Postmaster General has granted it second class mailing privileges. A large part of its revenue comes from respectable nationwide advertisers of the type who are unwilling to take space in a magazine which has been condemned by any public agency as obscene. Readership surveys have shown that Playboy's readers rank extremely high in terms of educational level, job status, and expenditures for

such items as private homes and travel. Over 70% of Playboy's readers have attended college. Their average age is 29. Thirty-eight per cent are business officials, owners, managers and professional men. Another 25% are college students.

The magazine also produces a television program known as Playboy's Penthouse.

We have attached to this brief exhibits which illustrate the character of Playboy Magazine and its aims. It has been endorsed by such organizations as Older Youth Publications of the Methodist Church. (See Appendix, Exhibits 1 and 2). We recognize that the exhibits cannot be treated as evidence. Nevertheless they present a hypothetical case of the type of magazine which will be disastrously affected by the majority opinion if it is not clarified.

We argue in the name of Playboy. But everything said here in its name applies as much to any publisher of a newspaper, magazine, or book and to producers of movies and television programs. It is important to stress at the outset that the issues seriously affect the public interest in the free flow of communications. Playboy therefore is a true *amicus*.

Playboy's vulnerability to censorship is due to the fact that it publishes jokes which though they are of a kind commonly told at mixed gatherings are nevertheless offensive to extremists. It also publishes a photo of an attractive girl in color in each issue, designated as "Playmate of the Month." For this reason it has had vivid experiences with the hazards of prior censorship.

ARGUMENT

CLARIFICATION OF THE OPINION IS REQUIRED

Playboy requests this Court to clarify the opinion in such a way that it will not trigger a rash of prior restraints on the ground of alleged obscenity imposed by police officers and other types of extremists who occupy censorship positions. The editors of Playboy are convinced that the magazine could not survive under such attacks, even though a court subsequently held that the prior restraints were unjustified.

We argue only that it is essential that the majority opinion be clarified. The critical point about the majority opinion is not that it is wrong if properly construed, but that it is misleading. If it stands unchanged it is certain to cause irreparable harm to the free flow of communication before it can be clarified through the slow process of constitutional adjudication.

As Mr. Justice Frankfurter said in his concurring opinion in *Smith* v. *California*, 361 U.S. 147, 161-162 (1959):

> "I am no friend of deciding a case beyond what the immediate controversy requires, particularly when the limits of constitutional power are at stake. On the other hand, a case before this Court is not just a case. *Inevitably its disposition carries implications and gives directions beyond its particular facts.*" (emphasis supplied)

The several respects in which the Court's opinion requires clarification are:

1. Does the opinion necessarily apply to newspapers, magazines and books as well as to movies?

2. Does the opinion mean that the standards of the *Roth* case if applied not by a Court but by a policeman-censor are constitutional?

3. Does the opinion mean that existing censorship procedures, without the use of expert testimony as dictated by the *Smith* case, are nevertheless constitutional?

A. THE DECISION URGENTLY REQUIRES CLARIFICATION ON THE SCOPE OF ITS APPLICATION TO COMMUNICATIONS OTHER THAN MOVIES.

The Court in its opinion is careful to state that it goes no further than to decide the validity of a prior restraint on the exhibition of movies. It further says that it is not concerned with the validity of the standards to be applied by the police commissioner under the Chicago code. We quote:

> "As to what may be decided when a concrete case involving a specific standard provided by this ordinance is presented, we intimate no opinion. The petitioner has not challenged all—or for that matter any—of the ordinance's standards. Naturally we could not say that every one of the standards, including those which Illinois' highest court has found sufficient, is so vague on its face that the entire ordinance is void. At this time we say no more than this—that we are dealing only with motion pictures and, even as to them, only in the context of the broadside attack presented on this record."

It is clear from this that the Court is not deciding the validity of any prior restraint to the printed word. But the *reasoning* of the opinion as opposed to its limited scope has equal application both to magazines and the movies. In limiting its decision the Court clearly indicates that there may be a distinction in the application of prior restraints between movies and printed material. But it is difficult for one interpreting the application of the opinion to Playboy Magazine to understand what that distinction can be.

The only plausible distinction between movies and the press with respect to prior restraints is that a delay in exhibiting motion pictures while the validity of the restraint is being tested in court might not cause irreparable injury. Indeed, the publicity attendant upon a prior restraint of a movie might increase its patronage. Movies carry no advertising material, whereas, in the case of a monthly magazine, prior restraint might destroy the continuity of successive issues and damage national advertising revenues for some time to come. Thus the balancing of the public and private interests would be different in the case of magazines. But how is anyone interpreting the opinion to know that the Court has this in mind?

Certainly the reasoning of the majority and the implication of the opinion indicates that a prior restraint is just as permissible if a magazine or newspaper is sufficiently indecent as in the case of movies.

B. THE DECISION URGENTLY REQUIRES CLARIFICATION ON WHETHER THE ROTH STANDARD, IF APPLIED BY A POLICEMAN-CENSOR INSTEAD OF A COURT, IS CONSTITUTIONAL.

Given the Nature of Police Censorship, a Stricter and Clearer Standard Is Required for the Police Censor Than Would Be Required for a Court.

The implication and the direction of the opinion seems to endow a police censor rather than a court with the power to apply the standards of obscenity laid down in the *Roth* case as a basis for a prior restraint. The majority opinion states:

> "... The petitioner has not challenged all—or for that matter any—of the ordinance's standards. *Naturally we could not say that every one of the standards, including those which Illinois' highest court has found sufficient,* is so vague on its face that the entire ordinance is void." (emphasis supplied)

This appears to be a direct holding that a prior restraint may be exercised by a police commissioner without judicial approval, and that the only remedy the exhibitor of a suppressed movie has is to try the case in court, unable to show his movie while the proceeding is pending. It is, of course, possible that this Court did not decide that a police commissioner could exercise prior restraints without first obtaining the approval of a court, but it is hard to make such an inference from the opinion in the present case because Times Film refused to show its film to the police.

Assuming then that the police may be made the censors, what standards should they apply? The foregoing quotation from the Times Film opinion indicates by implication that the police may apply the same standards as a court. This follows from this Court's observation in the present case that every one of the standards in the ordinance cannot be so vague that the ordinance is void on its face. Certainly, if any of the standards are valid, the standard of "obscenity" is. The Court defined the standard of obscenity in the *Roth* case as a "substantial tendency to deprave or corrupt . . . by inciting lascivious thoughts or arousing lustful desires." (*Roth* v. *United States*, 354 U.S. 476, 486 (1957)).

This therefore is the test which the policeman must have in mind. But the policeman must also interpret the following per curiam reversals on the authority of the *Roth* case.

One, Inc. v. *Olesen*, 355 U.S. 371 (1958).
Sunshine Book Co. v. *Summerfield*, 355 U.S. 372 (1958)
Times Film Corp. v. *Chicago*, 355 U.S. 35 (1957).

In *One, Inc.*, the Court of Appeals for the Ninth Circuit characterized the material as "obscene and filthy . . . offensive to the moral senses, morally depraving and debasing . . . designed for persons having lecherous and salacious proclivities" (241 F.2d 772, at 778). In *Times Film Corp.*, the Court of Appeals for the Seventh Circuit characterized the movie as "from beginning to end . . . supercharged with a current of lewdness generated by a series of illicit sexual intimacies and acts . . . We do not hesitate to say that the calculated purpose of the producer of this film, and its dominant effect, are substantially to arouse sexual desires" (244 F.2d 432, at 436).

In the third case, *Sunshine Book Co.* v. *Summerfield*, 128 F. Supp. 564 (D.C.D.C. 1955), 249 F.2d 114 (D.C. Cir., 1957), the District Court (Judge Kirkland) followed meticulously the standards laid down by the majority opinion in the *Roth* case. He examined each nude in the magazine and tried to analyze which would cause prurient thoughts. He condemned some and passed others and finally held that the magazine as a whole was obscene.

Yet in each of the cases, despite the vigorous characterization of the court below, this Court reversed without opinion.

It would appear therefore that to come within the lustful thoughts test of the *Roth* case the material would have to be so shocking as to amount to what Justice Harlan, quoting the Solicitor General, referred to in the *Roth* case as "hard core pornography" (354 U.S. at 507).

Yet the implications of the opinion in the present case are that a policeman may be given the power to suspend the sale of a magazine and destroy its value

on his own interpretation of the *Roth* and the subsequent cases. The kind of interpretation by the police which is likely to result can be predicted from the character of the public bodies to whom the power of prior restraints is entrusted by the majority opinion. We incorporate in the Appendix attached hereto excerpts from an article in *Newsweek* Magazine, February 13, 1961, page 89, in which some of these censors are described (Appendix, Exhibit 3). In Atlanta, Georgia, the censor is a 50-year old lady, the wife of an alderman, who last year barred Atlantans from seeing such movies as *Room At The Top* (nominated as one of the outstanding movies of 1959 in connection with the Hollywood "Oscar" awards); *Birth of a Nation* (a film classic about the Civil War), and *Never on Sunday* (a film which has been warmly praised in New York and other large cities). In Chicago the censors are policemen's housewives. In Lake Forest, Illinois, the names of the censors are secret!

We are confident that if the majority opinion is not clarified Playboy will find itself fighting for its life before censors scattered throughout the United States who interpret the opinion to mean that they have the power to bar Playboy from sale according to their own notions of what they think will arouse lustful thoughts. There is little doubt that, encouraged by the majority opinion, ordinances will be passed all over the United States endowing censors with that power. We have no doubt that Playboy would finally gain a victory before this Court after being suppressed for an indefinite time by prior restraints in every city where an ordinance authorizing that practice is passed. But that victory would coincide in time with Playboy's funeral.

We believe that the majority, when the issues are presented to it in more concrete form, will say that the

doctrine of prior censorship is intended to apply only to the most shocking cases—in the case of obscenity, only to hard core pornography. Short of that, the issue of obscenity should be left to a court's decision after the magazine has been sold. We believe that this Court is going to say that a stricter and more definite standard must be applied by the police when they exercise prior restraints than by a court in a prosecution on account of the sale of a magazine. We do not believe that this Court, when the issue is squarely before it, will authorize the police to impose a prior restraint on their own interpretation of the standards of obscenity laid down in the *Roth* case. We rather believe that an ordinance authorizing a prior restraint on the judgment of the police would have to be extremely definite. In the case of obscenity the test might be "hard core pornography." Looser words may be well enough when the magazine can continue its sale while the prosecution goes on. The only case that Playboy has ever been called on to defend under these circumstances arose when a newsdealer was indicted in Vermont. After a decision of the Supreme Court of Vermont couched entirely in procedural terms, *State of Vermont v. Verham News Corp.*, 121 Vt. 269, 155 A.2d 872 (1959), this case was *nolle prossed* by the State Attorney General shortly before trial. There was some inconvenience and expense to Playboy as a result, but if there had been a prior restraint the damage to Playboy would have been irreparable.

The reason for our belief that the application of the prior restraint rule will be limited by this Court when the issue comes squarely before it is that the purpose of the rule is to avoid outrageous and shocking cases rather than to give the police the power to ban borderline or risque material.

We may be right or wrong on these predictions of the future action of this Court. But of one thing we are sure, and it is that the city councilmen and legislators, who are even now studying the widely-publicized opinion in the present case prior to passing prior restraint measures,[1] will not take the view we have outlined above.

C. THE PROBABLE COURSE OF POLICE CENSORSHIP WILL BE TO GRADUALLY BROADEN THE STANDARD USED IN ACTUAL OPERATION. THUS THE POLICE CENSOR WILL BECOME A CLOG ON COMMUNICATIONS IN A FASHION FAR MORE FORMIDABLE THAN THE BOOK SELLER IN THE SMITH CASE.

Not only will the use of the *Roth* standard by a policeman-censor be dangerously broader than its use by a court, but the practice of prior censorship by the police or bureaucrats will tend inexorably over time to expand the standard actually used. Such expansion will result from the interaction of two forces, as the history of censorship abundantly shows. First, there will be the inherent momentum of censorship to resolve doubts against material seeking approval; second, there will be the efforts of publishers or producers to conciliate the censor and to negotiate with him to avoid trouble and delay in marketing an artistic product. The result will be an ever expanding net of censorship which will go far beyond the nominally narrow

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[1] Officials of the City of Chicago announced immediately after publication of the Court's opinion on January 23, 1961, that the ordinance would be revised. *Chicago Daily News*, Tuesday, January 24, 1961, page 5; *Chicago American*, Tuesday, January 24, and Wednesday, January 25, page 9. The *Chicago Sun-Times*, January 26, 1961, page 42, reports that "Chicago authorities are now turning attention to the problem of censoring pornographic magazines sold on newsstands. Corporation Counsel John Melaniphy is about to crack down . . ."

bounds of the *Roth* standard. See as an example the excerpt from *Newsweek* in the appendix to this brief.

In *Smith* v. *California*, 361 U.S. 147 (1959) this Court showed a notable concern with the indirect consequences of turning booksellers into censors through the imposition of strict criminal liability upon them. As the Court said (361 U.S. at 153):

> "By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature."

It will be remarkable indeed if the Court should show concern over the clog in free communications that would result from the bookseller taking care as to what books he will risk selling, and yet not show at least an equal concern over the clog on communications that will certainly result from the policeman-censor standing astride the very threshold of publication.

D. THE DECISION URGENTLY REQUIRES CLARIFICATION ON WHETHER EXISTING CENSORSHIP PROCEDURES MUST CONFORM TO THE SMITH CASE REQUIREMENT OF THE USE OF EXPERT TESTIMONY ON COMMUNITY STANDARDS.

There is also, as a constitutional matter, a serious procedural ambiguity in the type of censorship the Court now appears to be authorizing. The Court must recognize that police censorship as practiced in the United States is on an extremely informal basis satisfying few if any of the norms of administrative law.

(See the *Newsweek* excerpt, Appendix, Exhibit 3). Particularly acute as a constitutional problem will be other implications of *Smith* v. *California, supra.* In the *Smith* case the trial court had excluded expert testimony as to community standards over the objections of the defendant. Both Justice Harlan and Justice Frankfurter in separate concurring opinions voted to reverse the conviction of the defendant on the grounds that the exclusion of such evidence was an unconstitutional deprivation of due process under the Fourteenth Amendment. As Justice Frankfurter stated (361 U.S. at 165-166):

> "There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, Roth v. United States, 354 US 476, 489, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards.' Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859? The difference derives from a shift in community feeling regarding what is deemed prurient or not prurient by reason of the effects attributable to this or that particular writing. Changes in the

> intellectual and moral climate of society, in part doubtless due to the views and findings of specialists, afford shifting foundations for the attribution. What may well have been consonant 'with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time.' United States v. Kennerley (DC NY) 209 F 119, 120. This was the view of Judge Learned Hand decades ago reflecting an atmosphere of propriety much closer to mid-Victorian days than is ours. Unless we disbelieve that the literary, psychological or moral standards of a community can be made fruitful and illuminating subjects of inquiry by those who give their life to such inquiries, it was violative of 'due process' to exclude the constitutionally relevant evidence proffered in this case."

If the use of expert testimony when offered has become a constitutional requirement in a criminal trial, it must *a fortiori* be a constitutional requirement in any proceedings before a policeman-censor. We submit therefore that it is highly doubtful if any existing prior restraint censorship procedure in the United States satisfies the constitutional procedural requirements for the use of expert testimony laid down in the *Smith* case.

E. PLAYBOY AND OTHER PUBLISHERS CANNOT AFFORD TO AWAIT THE GRADUAL PROCESS OF CLARIFICATION OF THE OPINION THROUGH SUBSEQUENT CONSTITUTIONAL ADJUDICATION. PLAYBOY WILL BE DISASTROUSLY AFFECTED ECONOMICALLY IF THE OPINION IS NOT CLARIFIED PROMPTLY.

We believe that an extremely probable interpretation of the majority opinion by persons and officials interested in censorship would achieve the following results: Police commissioners or censors all over the United States with the extreme views which such per-

sons always have would be authorized to stop the sale of Playboy on grounds of obscenity under ordinances similar to the one in this case.

We have no doubt that Playboy would ultimately prevail on the merits against the charge of obscenity, and that the prior restraints imposed by the police would be set aside by any court which properly applied the standards of the *Roth* case as interpreted by this Court in the memorandum decisions which followed it, such as *One, Inc., Times Film* and *Sunshine Book*, discussed above.

But Playboy's victory in such a case would come too late for the following reasons: Playboy is a monthly magazine. An issue of Playboy becomes valueless when the month has expired. A greater part of Playboy's sales, as is the case with most magazines, are at the first of the month. A prior restraint would destroy or grievously impair the value of an entire issue. In addition, the attendant publicity would interrupt the continuity of successive issues and destroy the advertising revenues for succeeding issues. Playboy is not to be classified with a growing number of magazines like *One, Inc.* and many others which barely pass the test of the *Roth* case. Such magazines are shipped by express. They have no second class mailing privileges. They carry no respectable national advertising. What advertising they have is cheap and obnoxious.

By contrast, all of Playboy's advertising revenue is derived from respectable nationwide advertisers of the kind appearing in *Time, Life* and *The New Yorker*. These advertisers, for reasons which must be apparent to the Court, are unwilling to take space in any magazine which has been condemned as obscene by any

public body or whose month-to-month continuity is uneasy on this score.

A prior restraint suspending the publication of Playboy until it was reversed by some court properly applying the *Roth* case would disastrously impair its circulation among subscribers and probably destroy all its national advertising revenues for months to come, as well as confiscating the entire value of the issue which had been suspended.

Playboy has had experience with that sort of harassment by the Postmaster General. The Postmaster General, without notice, on at least two occasions ordered the local postmaster not to mail the magazine pending determination of whether it had any obscene content. Playboy's counsel had only a few hours' notice to request a court stay of the Postmaster General's order pending the administrative hearing. Had any of these stays been refused, enabling the Postmaster General to delay the mailing of the magazine until a hearing on obscenity, the result would have been disastrous even if Playboy won. It was only because the United States District Court for the District of Columbia never failed to grant a stay with respect to each issue under attack that the magazine survived. Some indication of the time interval which would have been involved in a post office administrative proceeding is revealed by Exhibit 4 in the Appendix, which is the final order in one of the cases.

The Postmaster General after repeated attempts two years ago to impose prior restraints on Playboy is now satisfied that the magazine meets all tests of decency. He has granted Playboy second class mailing privileges. But in the past Playboy's economic future has hung on the chance that it could obtain a stay of a prior restraint within twenty-four hours.

Playboy was able to meet the attacks of the Postmaster General only because a stay could be obtained in a single court in the District of Columbia, which had studied and understood and properly applied the standards of obscenity. If, as a consequence of the majority opinion, the *Roth* test can be applied by any police commissioner in any large city in the United States, counsel for Playboy will be completely powerless to protect it.

CONCLUSION

"Promise To the Ear To Be Broken To the Hope"

We are fully aware of the burden of an *Amicus Curiae* in requesting the Court to clarify its opinion. If this were not a case where the implications of a narrowly written opinion threaten to trigger a series of ordinances which may well destroy Playboy's economic future, we would not have the temerity to approach this Court. Playboy will be forced to litigate in any number of cities. The sale of its magazine will be forbidden while litigation is going on. These are not fancied fears. Playboy was compelled to fight for its life with the Postmaster General until he finally became convinced that he could not exercise what was in effect a prior restraint by forbidding the use of the mails. In defense of his conduct it may be said that the pressures from extreme lovers of decency were very great. Those same pressures exist in every city in the United States. The voice of the censor is a powerful one, particularly in these times of change in contemporary standards which are not yet accepted by a powerful minority. No city councilman or state legislator wants to vote against a measure which appears to be in the interest of decency. And so we believe that in practical effect the opinion as it stands will amount to the grant of power to state and city censors to destroy

magazines like Playboy by enjoining them in accordance with their own private notions of decency.

Magazines of a lower character than Playboy which are sent by express and which have no significant advertising revenue contain nothing but the cheapest sort of illiterate writing. Playboy pays top prices for writers like Carl Sandburg, John Steinbeck, H. Allen Smith, Evelyn Waugh, Max Shulman, P. G. Wodehouse, Nelson Algren, Budd Schulberg, Ben Hecht, Vance Packard, Erskine Caldwell, John Collier, John Crosby, Woolcott Gibbs, Ian Fleming, Marion Hargrove, James Jones, Garson Kanin, Jack Kerouac, John Lardner, Leonard Lyons, Philip Wylie, Dr. Theodore Reik, Alberto Moravia and many others. Its expenses are heavy and its organization far-flung. Lower grade magazines will, therefore, not be irreparably injured if they are suspended for a while. They can reappear only with minor losses. But Playboy cannot survive the long road that lies between court decisions in no one knows how many cities and states and the final opinion of the Supreme Court of the United States. Reluctant as we realize this Court must be to clarify any opinion at the request of an *amicus curiae*, we believe that in this extraordinary case simple justice requires it.

We repeat: The difficulty with the Court's opinion in our view is not that it is wrong but that it is misleading. In the bluntest terms, in ratifying censorship in the abstract, the Court has invited censorship which it will be forced to hold unconstitutional in any of the forms in which it will concretely appear. It has, as Justice Jackson noted in paraphrasing *Macbeth* in another connection, made a "promise to the ear to be broken to the hope."

Perhaps if the opinion stands as rendered, in another decade of constitutional adjudication it will become sufficiently clarified and its holding will become sufficiently narrowed. But in that interim, irreparable harm will be done not only to Playboy but to other publishers of magazines and books and to the producers of movies and perhaps television programs as well, and in the end to the free flow of communications in the United States.

It is the responsibility of this Court to cancel the invitation to censorship that its opinion appears to generate and it is its responsibility to cancel the invitation now—before the rash of ordinances and statutes destined for unconstitutionality have had the chance to play havoc with the Arts.

For the reasons given, a rehearing should be granted so that the majority opinion may be clarified.

Respectfully submitted,

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APPENDIX

EXHIBIT 1

THE METHODIST CHURCH
EDITORIAL DIVISION—BOARD OF EDUCATION
201 EIGHTH AVENUE, SOUTH, NASHVILLE 3, TENNESSEE

June 23, 1959

Mr. Jack J. Kessie, Associate Editor
PLAYBOY
232 East Ohio Street
Chicago 11, Illinois

Dear Mr. Kessie:

Last month a number of churchmen, professionally responsible for working with young adults, met in Chicago for a consultation on how to do a better job of attracting these persons to the churches. On the list of "recommended reading" were several issues of PLAYBOY. Why? Because—contrary to much popular opinion—many church leaders have a pretty clear idea of what interests young adults. The Starch Report on PLAYBOY made it evident that you have them in sharp focus, also. Obviously, we won't offer the young male reader the same fare. But we don't kid ourselves into thinking that healthy young men are sexless, either. And if PLAYBOY's readers are the better educated persons that they appear to be, they will have a more-than-academic interest in religion—provided it is not a pink tea and cookie affair.

For the past half dozen years, the constituent churches of the National Council of Churches have been trying to draw a bead on persons in the 18-to-28 age range. To that end, several national consultations have been held, following which the churches have attempted to develop programs and publications which will speak with directness and urgency to young adults. We are all too aware that we still don't have the answer, for this is the period of "the big dropout" in most denominations. But there is more experimentation and fewer of the expected answers at

this age than at any other. Perhaps some of the new paperback books in the "Faith For Life Series" for young adults will ring a bell with them. (I'm chairman of the National Council's curriculum committee that produces these.)

Would you be interested in an 1800-word feature, possibly entitled "You're on the Churches' Wanted List," which would summarize the churches' efforts to come up with an interesting, helpful, and unhackneyed program for young adults? It could include a description of the profile of young adults as the churches see them; indicate the kinds of activities that young adult groups across America are carrying on under church auspices; and suggest ways in which the readers—if they are interested—can influence the churches to develop a realistic and effective program.

If this idea appeals to you—or if it suggests another article possibility—please indicate a desirable length for the manuscript and any special points that you would like to see developed. Also, will you please indicate the probable honorarium for such an article.

Cordially yours,
Fred Cloud
Fred Cloud, Editor
Older Youth Publications

(By "older youth" we mean persons 18 to 23, in college, working, and in the armed forces. We hope to change this unflattering label for the age group soon.)

EXHIBIT 2

COLLEGE OF JOURNALISM AND COMMUNICATIONS
UNIVERSITY OF ILLINOIS, URBANA

September 23, 1958

Mr. Victor Lownes III
Vice President
PLAYBOY
232 East Ohio
Chicago 11, Illinois

Dear Mr. Lownes:

You will be interested in learning, I hope, that the revised edition of my *Magazines in the Twentieth Century*, just now being released, carries a short history and evaluation of *Playboy*. As I think I told you when you commented on the omission from the first edition, *Playboy* did not seem worth including when the original manuscript went to the printers three years ago. Its life expectancy seemed too short, frankly, and its quality too doubtful.

I am delighted that I have been a poor guesser on both counts. In several talks in the past year, one of which is enclosed, I have mentioned *Playboy* as evidence of vitality in the magazine industry. Hugh Hefner's experience with *Playboy*, I think, is significant far beyond his personal success. Hef has demonstrated that the newcomer of ingenuity can still found a successful magazine on a lot of courage and energy and on very little financial outlay—a situation encouraging to the free trade in ideas. He has also demonstrated that readers will pay a fairly substantial sum for a publication they really want.

I have been impressed by the steady upgrading of *Playboy's* content. In some ways, I am afraid, *Playboy* is unfortunately paying a penalty for its own success. As you well know, it spawned a flock of imitators, none of which has approached it in quality and some of which were close to pornographic. Persons who have never bothered to

read *Playboy*, I suspect, have sometimes lumped it with the least of its brethren. So there exists a stereotype of *Playboy* which has very little to do with the present reality.

Best wishes.

Sincerely,

TED PETERSON
Theodore Peterson
Dean

EXHIBIT 3—NEWSWEEK MAGAZINE, FEBRUARY 13, 1961, p. 89

CENSORSHIP: WHO BANS WHAT

For sixteen years Mrs. Christine Smith Gilliam has been deciding what Atlanta may or may not see or hear at the movies. A reporter who called on her at her neat white cottage last week found Mrs. Gilliam and her alderman husband playing a Mozart duet on the piano and violin. Mrs. Gilliam, a 50ish redhead, was asked about her job. "I believe in being flexible," she said. "The word for a female dog is perfectly acceptable when applied to a female dog. But I cut out a scene of a man applying the term for a female dog to his wife in a conversation with his mistress. I'm having a big hassle right now trying to cut out two 'bastards' and a 'by God' from a British movie.

Last year Mrs. Gilliam banned eleven movies, including "Room at the Top," "Birth of a Nation," and "Never on Sunday." But as she spoke last week, for the first time she had reassurance from the Supreme Court that she was in business legally.* "I don't know all the legal implications of the Supreme Court decision," said Mrs. Gilliam, "but apparently it rejects the basic argument that movies and press are legally one and the same as far as censorship

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* By a squeaky 5-4 margin, the Court on Jan. 23 upheld the censor's right to see and license a film before it is publicly shown.

goes. We still may be challenged on the ground on which we ban a particular picture, but not on our right to ban. I have felt for years that 'prior restraint' was correct, and I'm glad the Supreme Court has said it."

RELIEVED: There are now close to 60 state and city movie censors in the United States and, like Mrs. Gilliam, all of them this week were breathing more easily than they had in years. Roughly 50 cities now have active censorship boards, about twenty of which are run or dominated by policemen. Four states—New York, Kansas, Maryland, and Virginia—also have censorship. A number of other states are considering bills to let them put movies into one of two categories: For everybody or for adults only.

Besides the public censors, the Johnston Office of the Motion Picture Producers Association gives or withholds its seal from every U.S. movie—and the seal determines whether a picture can be shown in MPA member theaters (which are in the majority) or to the armed forces. Lastly, there are such organizations as the Legion of Decency, which can proscribe films for Catholics, and the Protestant National Council of Churches, which reads scripts in advance and has effectively discouraged a number from being produced.

But in the present movie market, in which the American moviemaker gets half of his income from foreign showings of his films, the foreign censor is also a power to be reckoned with. Last July, for example, "Private Property," about a rape, was forbidden in its dubbed version in France, although the original version was OK'd. In August, actor-producer Burt Lancaster was offered the chance to cut six words from "Elmer Gantry" to get it shown in Canada's Ontario Province, and chose to be banned, not cut. In November, England's censor came to Hollywood to tell Americans how to tailor their movies for British consumption. (What he said, in effect: Don't worry about sex, but tone down the violence.) Last year Holland banned "Guys

and Dolls"; the censor felt it might offend sensitive members of the Salvation Army.

CRITERIA: The question of just who passes judgment on movies in this country and what the criteria are is wildly complex. New York requires its censors to be civil servants with a M.A. degree. Chicago's censors rotate, but are generally policemen's widows; the head censor there is a police sergeant who recently declared: "If a picture is objectionable for a child, it is objectionable, period." In Lake Forest, Ill., the censors' very names are kept from the public. The head censor in Memphis, Tenn., is a housewife who recently wrote: "I have heard twice in pictures a word I have never heard used before. S-l-u-t." In Evanston, Ill., a policewoman censors movies in her spare time, for $180 a year.

Censors generally base their bans on the charge of obscenity. Nonetheless, there are many other prohibitions in law: Depicts "train robberies" (Sioux City, Iowa); shows "any female in a drunken state, unless reduced to a flash" (Birmingham, Ala.); might "promote . . . sectional prejudices" (Houston, Texas). There is also the shock factor: Chicago ordered a scene from Walt Disney's "Vanishing Prairie" deleted because it showed the birth of a buffalo. Top industry censor, the Johnston Office, takes its cue from "established morality,"—a way of saying it often winks at its own rules.

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EXHIBIT 4

POST OFFICE DEPARTMENT

WASHINGTON, D. C.

June 4, 1958

H. E. Docket No. 4/84

In the Matter of

HMH PUBLISHING COMPANY, INC.

for the entry of "Playboy" magazine as second-class mail matter at Chicago, Illinois

Order

The above proceeding was instituted on February 9, 1956, by the filing of a Motion to Show Cause why the Respondent publishing company should not be granted second-class privileges. The Respondent moved for a more definite statement of the charges which motion was granted by the Hearing Examiner. Over two years ago the Petitioner stated in a memorandum to the Chief Hearing Examiner that such would be supplied "as soon as possible." Nothing having been furnished, the Respondent moved to dismiss this proceeding on May 9, 1958. June 2, 1958, was the date set for Reply to this motion by the Petitioner. No reply having been made, the Motion of the Respondent is granted. Second class privileges are granted to the Respondent publisher effective the date of his application.

(Signed) CHARLES D. ABLARD
Judicial Officer